

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GREGGORY BRETT OWINGS**

Claimant

VS.

**WALTER A. YOUNG CONSTRUCTION  
COMPANY, INC. and STEVE BEYRLE, DBA  
BEYRLE CONSTRUCTION**

Respondents

AND

**CIGNA and TRAVELERS INSURANCE COMPANY**

Insurance Carriers

Docket No. 192,579

**ORDER**

The respondent, Walter A. Young Construction Company, Inc., and its insurance carrier, CIGNA, requested review of the Award dated June 20, 1996, entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on December 11, 1996.

**APPEARANCES**

John C. Nodgaard of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for the respondent Walter A. Young Construction Company, Inc. and its insurance carrier, CIGNA. Lyndon W. Vix of Wichita, Kansas, appeared for the insurance carrier, Travelers Insurance Company. No one appeared for Steve Beyrle, d.b.a. Beyrle Construction.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge awarded claimant benefits based upon a 91 percent permanent partial general disability. The respondent, Walter A. Young Construction Company, Inc., and its insurance carrier, CIGNA, requested the Appeals Board to review the following issues:

- (1) Did the relationship of employer and employee exist between claimant and Steve Beyrle, d.b.a. Beyrle Construction, on the date of accident?
- (2) What is the nature and extent of claimant's injury and disability?
- (3) Is Travelers Insurance Company estopped to deny coverage of Steve Beyrle, d.b.a. Beyrle Construction, for purposes of this accident?

**FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

The Award by the Administrative Law Judge should be modified.

- (1) Claimant injured his back on June 8, 1994, while helping lift a truss. At the time of the incident, claimant was working for Steve Beyrle, d.b.a. Beyrle Construction, as a sider and framer.
- (2) On the date of accident, claimant was an employee of Steve Beyrle, d.b.a. Beyrle Construction, who was performing work as a subcontractor for the respondent Walter A. Young Construction Company, Inc.
- (3) Although it has been alleged that claimant was a partner of Steve Beyrle rather than an employee, the Appeals Board finds claimant did not enter into a partnership agreement with Steve Beyrle to own and operate Beyrle Construction. The Appeals Board also finds the relationship between claimant and Steve Beyrle lacks the indicia of partnership. Claimant was paid by the hour for his work which was performed under Mr. Beyrle's supervision. At the time of the accident, claimant was earning \$15 per hour which equates to a \$600 per week average weekly wage.
- (4) Claimant initially sought medical treatment from Stanley W. Beyrle, a naturopath. After missing approximately one week of work, claimant returned to work for Beyrle Construction and worked approximately two weeks until he quit. Claimant terminated his employment with Beyrle Construction due to a combination of reasons including Steve Beyrle's failure to pay claimant, Steve Beyrle's allegations that claimant stole equipment, and the back injury.
- (5) After leaving Beyrle Construction, in July 1994 claimant began working at \$9 per hour for another construction company where he worked approximately four months. At the time of regular hearing in August 1995, claimant had also worked post-injury for short periods for

an auto auction, a temporary employment agency (one day), a third construction company (one week), and had performed miscellaneous jobs for relatives. Since leaving Beyrle Construction, claimant has earned between \$4.25 and \$9 per hour. Despite his job search efforts, claimant was unemployed at the time of regular hearing.

(6) Claimant ultimately came under medical treatment by board-certified orthopedic surgeon Robert Eyster, M.D., who first saw claimant in November 1994 and diagnosed a bulging disc. Dr. Eyster recommended work hardening and a myelogram which was performed and indicated degenerative disc disease with mild anterior extradural defect at the L4-5 intervertebral level.

(7) Dr. Eyster treated claimant through June 1995. The doctor believes claimant has a 5 percent whole body functional impairment as a result of the mild degenerative disc disease and slight disc bulge. He also believes that claimant should observe the following work restrictions and limitations: no lifting over 80 pounds, no repetitive lifting over 35 pounds, and no repetitive bending and twisting. The doctor believes every patient should observe those restrictions to avoid injury and, therefore, the doctor would have placed those restrictions on claimant before the June 1994 accident.

(8) At the request of claimant's attorney, board-certified physiatrist and physical medicine physician Philip R. Mills, M.D., examined claimant in May 1995. Dr. Mills diagnosed claimant's back condition as interspinous ligament compression syndrome and also found a 5 percent whole body functional impairment. He believes claimant should restrict his work activities to no lifting over 50 pounds (and only then with good body mechanics) and avoid prolonged sitting without a change of position.

(9) When considering Dr. Mills' entire testimony, the Appeals Board finds the doctor believes claimant has lost the ability to perform 19 of 27, or 70 percent, of the job tasks claimant performed while working for various employers over the 15-year period immediately preceding the June 1994 accident. The Appeals Board construes Dr. Mills' testimony to indicate that claimant could probably perform those jobs tasks described as nailing boards, operating a Skil saw, operating a forklift, carrying tar lugs, mopping hot tar, using hand and power tools, supervising employees, and operating heavy equipment.

(10) When considering Dr. Eyster's entire testimony, the Appeals Board finds the doctor believes that claimant has lost the ability to perform 18 of 27, or 67 percent, of his former job tasks which he performed in the 15-year period preceding the date of accident. The Appeals Board construes Dr. Eyster's testimony to indicate claimant could probably perform the job tasks described as nailing boards, operating a Skil saw, carrying tar lugs, mopping hot tar, using hand and power tools, supervising employees, operating a forklift, welding iron buildings, and operating heavy equipment.

(11) Claimant left the construction company where he was earning \$9 per hour because he was undergoing medical treatment prescribed by Dr. Eyster and also having physical problems performing the work. After obtaining a job with another construction company, McNabb-Ensz, at \$7 per hour, claimant quit when he was asked to perform work outside his medical restrictions. When considering all of the evidence, the Appeals Board finds claimant retains

the ability to earn between \$4.25 and \$9 per hour, or approximately \$7 per hour, which equates to \$280 per week.

#### CONCLUSIONS OF LAW

(1) The respondent Walter A. Young Construction Company, Inc. and its insurance carrier, CIGNA, contend claimant was a partner in Beyrle Construction and not an employee on the date of accident. The Appeals Board disagrees and finds claimant was an employee of Beyrle Construction on the date of accident. That conclusion is based upon the evidence that claimant did not enter into a partnership agreement with Steve Beyrle to own and operate Beyrle Construction. As indicated above, claimant was paid by the hour instead of receiving a percentage of the profits and Steve Beyrle maintained supervisory control over claimant's work. In addition, there is a lack of business records indicating the existence of a partnership and a general lack of other indicia of a partnership.

(2) Because his is an "unscheduled" injury, the computation of claimant's permanent partial general disability is governed by K.S.A. 44-510e which provides as follows:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In determining task loss, the Appeals Board has excluded duplicative tasks. As indicated above, Dr. Mills has indicated claimant has a 70 percent task loss and Dr. Eyster has indicated a 67 percent loss. Averaging those percentages, the Appeals Board finds claimant has lost the ability to perform 69 percent of the tasks he performed in the 15-year period preceding the June 1994 work-related accident.

Under Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, \_\_\_ P.2d \_\_\_ (1997), a worker is required to seek appropriate employment following a work-related accident. Since his termination with Steve Beyrle, d.b.a. Beyrle Construction, claimant has obtained temporary work paying between \$4.25 and \$9 per hour. Because following his accident claimant has sought work, the Appeals Board finds claimant has made a good faith effort to find appropriate employment. Therefore, the actual difference in claimant's pre- and post-injury wages should be utilized for purposes of the wage loss prong of K.S.A. 44-510e. Because claimant is unemployed, that difference is 100 percent.

As required by K.S.A. 44-510e, the Appeals Board averages the 100 percent wage difference with the 69 percent task loss and finds claimant has an 85 percent permanent partial general disability.

(3) The respondent Walter A. Young Construction Company, Inc. and its insurance carrier, CIGNA, contend Travelers Insurance Company either provided or should be estopped to deny insurance coverage of Steve Beyrle, d.b.a. Beyrle Construction, for the accident in question. Further, Young and CIGNA also contend Beyrle and Travelers should be responsible for any benefits awarded claimant.

Under the provisions of K.S.A. 44-503, an injured employee of a subcontractor may recover workers compensation benefits from a principal and the principal may then seek indemnity from the subcontractor. That perfectly describes the present situation. The Appeals Board finds the issue concerning Travelers insurance coverage does not affect claimant's entitlement to benefits from Young and CIGNA.

Because Travelers denies insurance coverage, and because the question does not affect claimant's right to benefits from the respondent, Walter A. Young Construction Company, Inc., under the provisions of K.S.A. 44-503, the issue concerning Travelers' coverage is not one in which the Division of Workers Compensation has the authority or jurisdiction to decide. See American States Ins. Co. v. Hanover Ins. Co., 14 Kan. App. 2d 492, 794 P.2d 662 (1990), and Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961), which hold that insurance carriers may not litigate their respective liabilities in workers compensation proceedings when the claimant's interest is not at stake unless the act should otherwise expressly provide. The issue whether Steve Beyrle, d.b.a. Beyrle Construction, had insurance coverage with Travelers on the date of claimant's accident for purposes of potential indemnification is not an issue which the Workers Compensation Act expressly grants the Division of Workers Compensation the jurisdiction to decide.

The Appeals Board construes the request for judgment against Travelers as also a request for indemnity against Beyrle Construction under K.S.A. 44-503(b) which provides as follows:

Where the principal is liable to pay compensation under this section, the principal shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of this section, and shall have a cause of action under the workers compensation act for indemnification.

The Appeals Board finds the respondent, Walter A. Young Construction Company, Inc., and its insurance carrier, CIGNA, are entitled to indemnity from Steve Beyrle, d.b.a. Beyrle Construction.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated June 20, 1996, entered by Administrative Law Judge Nelsonna Potts Barnes should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Gregory Brett Owings, and against the respondent, Walter A. Young Construction Company, Inc., and its insurance carrier, CIGNA, for an accidental injury which occurred June 8, 1994, and based upon an average weekly wage of \$600 for 11.14 weeks of temporary total disability compensation at the rate of \$313 per week or \$3,486.82, followed by 308.35 weeks at the rate of \$313 per week or \$96,513.18, for an 85% permanent partial general disability, making a total award of \$100,000.

As of December 31, 1997, there is due and owing claimant 11.14 weeks of temporary total disability compensation at the rate of \$313 per week or \$3,486.82, followed by 174.86 weeks of permanent partial disability compensation at the rate of \$313 per week in the sum of \$54,731.18 for a total of \$58,218.00, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$41,782.00 is to be paid for 133.49 weeks at the rate of \$313 per week, until fully paid or further order of the Director.

The respondent, Walter A. Young Construction Company, Inc., and its insurance carrier, CIGNA, are entitled to indemnification for the amounts paid and awarded in this proceeding from Steve Beyrle, d.b.a. Beyrle Construction.

The Appeals Board hereby adopts as its own the remaining orders set forth in the Award to the extent they are consistent with the above findings and conclusions.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John C. Nodgaard, Wichita, KS  
Douglas C. Hobbs, Wichita, KS  
Lyndon W. Vix, Wichita, KS  
Steve Beyrle, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director